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A HISTORICAL SKETCH OF MOHAMMEDAN JURISPRUDENCE.

II. THE 'LEGISLATIVE PERIOD.'

Such briefly were the customs and usages of the Arabs when the juridical principles of Islam were gradually introduced. But its 'legislative period' did not commence until after the Prophet's exile to Medina when the community of his followers grew sufficiently large to require rules and regulations for the guidance of their conduct. The Prophet was the Messenger of God, and to him He revealed in His own words, His wishes and commands through the medium of the angel Gabriel. The collection of these revelations is called the Qur'án, but its text which existed from eternity was communicated from time to time in pieces called Ayahs, or verses. The verses that lay down rules of law were mostly revealed when cases actually arose requiring decision according to the principles of Islam. Sometimes God in His wisdom repealed some previous injunctions and laid down others in their stead. Sanctions or rewards were attached to the violation or observance of God's ordinances and in many cases they were both spiritual and legal.

The texts in which a principle or rule of law is explicitly enunciated are small in number and they relate mostly to marriage, divorce, inheritance, and punishment of crimes. They principally occur in the Súrahs of Al-Baqarah, An-Nisá, Al-Imrán, Al-Má'idah, An-Núr, At-Taláq, Al-Bará'ah and Baní Isrá'íl. There are also some general injunctions which have formed the basis of important judicial inferences. The Qur'án is a continuation of other divine books such as the Old and the New Testaments, but these latter, it is believed, have been considerably tampered with. Except where so altered the laws of Moses and the teachings of Christ are binding on a Muslim, if no rule is expressly provided for him.

The Mohammedans are enjoined to obey the Law and the rulers. God will punish the wrong-doers and the transgressors of His ordinances according to the measure of the offense. But punishment is provided for certain offenders to be meted out to them in this world. God will also reward every good action. For offenses against the person generally, retaliation is the principle of punishment as laid down in the Qur'án. Retaliation is the right of the person injured or his family. They may, if they so choose, either condone the offense or accept compensation (Diyah)

in satisfaction of the injury. The rule holds good whether the offense committed is murder, or grievous hurt, or simple hurt. Life is to be exacted for life, and limb for limb, and no difference is to be made in this respect because of the position or sex of the person murdered. If death or injury be caused by mistake or accident, atonement is to be made by the emancipation of a slave or the giving of alms.

For waging war against God or his Prophet, or for highway robbery, the malefactor is to be put to death, either by crucifixion or impalement, or by one hand and one foot of his being cut off, or he is to be exiled from the country. For theft the punishment is the mutilation of one hand. A person falsely accusing a woman of adultery is to be sentenced to a whipping of 80 stripes. An adulterer or adulteress is to undergo a whipping of 100 stripes and if married, to be stoned to death.

Irregular relations with women are forbidden, and the Mohammedans are encouraged to marry. It is declared lawful for a Mohammedan to have four wives at one time provided he can be just, equal and impartial in his treatment of all of them. Otherwise he should be content with one wife. It is unlawful to marry more than four wives, but a man's slave-girls are lawful to him.

A Muslim may not marry his own mother, step-mother, grandmother, daughter, grand-daughter, paternal aunt and maternal aunt, niece, foster-mother, foster-sister, mother of his wife, widow of a son, wife's daughter (by a previous husband), two sisters at one time or a woman already married to another man. He should choose a free woman for his wife, but if his means will not afford, he may marry a slave-girl. The practice of forcibly marrying the widows of a deceased person by his heirs, is denounced and declared unlawful.

It is enjoined that in marriage a dower should be given to the wife. She is not to be deprived of it by force or fraud, but she may voluntarily make a gift of it to the husband or release her claim. A man cannot get rid of his liability to pay the dower by falsely accusing her of unchastity. The husband must maintain his wife and protect her. He is not to ill-treat her or confine her unless her conduct be obviously unchaste, but it is better in that case to put her away.

A man is permitted to divorce his wife. If he divorces her by pronouncing the word *Taláq* once or even twice he may take her back, and this he is recommended to do, but if he pronounces *Taláq* three times it becomes irrevocable and effectuates a final

separation. He may, however, re-marry her, but only after she has been first married to another man and divorced by him. A wife may obtain separation by way of divorce from her husband by making a payment to him or releasing her right to dower.

A divorced woman may marry again on expiration of the period of three months, but if pregnant, not until she has been confined. The period of *Iddah* for a widow is four months and ten days counting from the date of her husband's death.

If a man swears that he will not touch his wife, this will operate as divorce after four months, unless in the meantime he has resumed marital relations with her. But according to another interpretation he will be required to divorce her on the lapse of four months.

Infanticide is forbidden and denounced under severe penalties.

A slave cannot hold property. His master does not possess the power of life and death over him, though he may chastise him according to the measure of his offense. The manumission of a slave is encouraged as an act of the highest piety and as an atonement for many sins of commission and omission.

The seeking of one's livelihood by means of trade and industrial art is encouraged. Transactions in the nature of buying and selling are declared lawful. Deception in commercial transactions and gambling are forbidden. The rights and property of others are to be respected and a Mohammedan is enjoined to fulfill his contract. Ribá (*lit.* increase) or usury is at one place prohibited in general terms, but in another text it is denounced as the charging of interest many times the capital.

Alms to the poor in the name of Zakát are made obligatory. But over and above this a Muslim is promised spiritual reward for whatever he may give in charity to the poor or to his kindred. The merit of making gifts to each other is emphasized.

In administering the deceased's estate, his debts are to be paid first, and then the bequests, and what is left is to be divided among the heirs. It is ordained that on the death of a Muslim certain specified shares are to be given to the father, mother, wife or husband, which, however, will be reduced in case he has left any issue. If he leaves children, both male and female, the residue will be divided among them, each son taking twice as much as a daughter. A sister, both full and uterine, is also allotted a share and if there is a brother she is to take half of what the brother gets, following the principle that the male heir is to receive double the

share of the female. An adopted son does not acquire the status of a natural-born son, and he has no right to the inheritance. Distant kindred according to the order of relationship are to have a share in the inheritance (that is, in absence of shares and residuaries). Disposition of property by will is held lawful. In making a will the claims of the kindred ought to be considered.

The guardian of a minor is to take care of his person and property and he must not misappropriate his ward's property to himself on any pretense. If, however, he is poor he may spend as much as may be absolutely necessary for his wants. On the minor attaining the age of understanding the guardian must render to him a true account. The same injunctions are repeated with respect to a lunatic's and an imbecile's person and property.

The bearing of false testimony is forbidden, and a Muslim is commanded not to take other people's property wrongfully, by taking a false oath before the Judge, or by producing false evidence. A man must bear true testimony, although it be against himself or his parents, against the rich or the poor. A transaction should be recorded in writing in the presence of witnesses whenever possible. But an exception is made in cases where a transaction takes place in the course of trade from hand to hand, or an article has been pledged by way of security. A testator making a will should get two truthful men to witness it, and a charge of adultery would not be established except by the testimony of four witnesses.

The Muslims are enjoined to settle their disputes amicably, and the Magistrate must adjudge justly and equitably between the parties.

During the lifetime of the Prophet, the Qur'án was not the only source of the ordinances of God. Often questions arose for decision for the solution of which no direct revelation was vouchsafed, or certain points had to be explained and made clear. The pronouncements made by the Prophet on all such occasions are known as Ahádith, or precepts, and are regarded as of sacred authority. His dicta in all matters of law and religion were inspired and suggested by God though expressed in his own words, while the Qur'anic texts were God's both in language and thought. The Prophet's precepts and usages were likewise guided by God, and in the same way as the texts of the Qur'án furnished an index of what was right and lawful. What he enjoined should be done was regarded as obligatory. What he forbade was unlawful. Any act that he approved and recommended was *Mandûb*, or praiseworthy, and whatever he disapproved was *Makrûh*, or improper,

and should be avoided. His approval or disapproval was sometimes implied from his conduct. If, for instance, a certain usage or course of action was followed by the Muslims within his knowledge and the Prophet expressed no disapproval thereof, its legality was presumed. Similarly, if the Prophet studiously avoided a certain course of conduct it is to be presumed that he disapproved of it. A precept universally accepted as genuine, if of a later date and clearly inconsistent with it, might modify or repeal a text of the Qur'án, but only a few such instances are known in the province of Jurisprudence. Many of the precepts merely enforce the injunctions of the Qur'án, but those alone will be noticed here that establish a fresh principle or rule of law.

It is laid down that a magistrate should seek his law first in the text of the Qur'án and then in the precepts and usages of the Prophet himself, and if both of these sources fail him, he must rely upon his judgment. The Prophet when he deputed Mu'ádh to Yaman as Governor, asked him as to how he was going to adjudicate cases. Mu'ádh answered, "According to the book of God" (meaning the Qur'án). Then the Prophet inquired how he would adjudge if the point was not covered by the Qur'án. Mu'ádh replied, "According to the precedents of the Prophet." The Prophet next inquired how he would act if there was no such precedent. He said, "In that case I will exercise my judgment." This the Prophet approved of. The Prophet also laid down the principle that the Muslims as a body cannot agree in an error; a saying which has formed the basis for the doctrine of *Ijmá*, (consensus of opinion).

With regard to family relations it is laid down that the marriage of a grown-up girl whether virgin or widow is not valid except with her consent, which must be signified in the presence of two witnesses. It should be celebrated with due publicity, for a secret marriage is like fornication. Marriage for a limited period (*Mut'ah*) was at first allowed by the Prophet, but he prohibited it afterwards.

A Muslim may marry a Christian or a Jewish woman, that is a *Kitábiyyah* (one who follows a revealed religion), but not an idolatress. If the wife of an infidel embraces Islam she is to call upon her husband to adopt her faith and if he refuses she would be entitled to a separation.

It is not necessary in law that in divorcing a wife the word *taláq* or its equivalent should be pronounced face to face. A man's

likening his wife to the back of his mother (Dhihár) does not effect a divorce, but he is only to make atonement for the sin. If the husband accuses his wife of adultery and she denies the charge, both will be made to swear to the truth of their allegations and if they take the oath they will be separated (Li'án).

It is reported that divorce, marriage and revocation of divorce are established by the utterance of words regarded as express for the purpose, although in jest. The right of the wife and of the child to maintenance is made clear.

A man that first brings into cultivation waste land becomes its owner. Similarly a spring of water belongs to him who is the first to discover it and takes possession of it.

Property acquired by an expedition is to be divided among those who took part in it with the exception of one-fifth share, which goes to the State. The revenue realized by the poor rate (Zakát) was deposited in the public treasury (Baitu-l-Mál), but this fund was to be devoted only to the use of the poor. Excepting perhaps escheats, there was no other source of public revenue. The Imám has custody of the public property and revenue and it is reported of the Prophet that he as the head of the State sometimes allotted land to a follower.

The finder of a trove is to advertise it for a sufficient length of time, and if the owner does not come forward he can appropriate it to his own use. If a man loses a movable or it is stolen from him, and the thing is found in the possession of another person, the owner has the better claim to it. If the man in whose possession it is found bought it from the thief or the finder, he will be entitled to a refund of the price he paid, from the vendor.

A contract entered into by a man must be fulfilled by him. For instance, a man saying to another "sell this cloth for me for so much and whatever you will receive above that (meaning the price specified) is your profit," he will be bound by his contract. The Prophet sanctioned the delegating of one's authority to an agent as a matter of convenience. An accredited agent is held to bind the principal by his act.

In buying and selling the bargain must be fair. The subject-matter of the contract must be in existence, and the bargain is not to be struck until after the inspection of the goods. No party is to take the other by surprise, and transactions regarded as speculative and of a gambling nature are condemned. Contracts of sale which under the names of *Maháqalah*, *Mulámasah*, *Munábadhah* and *Muzábanah* were prevalent among the Arabs are prohibited

on the ground that they are likely to lead to hardship towards one or other of the parties.

Ribá (usury) is thus defined:—A sale of gold for gold, silver for silver, wheat for wheat, date for date, unless it be from hand to hand and for an equal quantity, is Ribá and therefore unlawful. Both the man that takes and the man that pays *ribá* are denounced.

It is lawful to pay in advance the price of goods (ascertained) to be delivered within a stated period. Such a contract is called *Salam*. It is lawful to pledge an article for the price of goods bought, and it is reported that the Prophet himself once pawned his coat of mail with a Jew for the price of wheat which he bought.

The making of an *inter vivos* gift (*hibah*) is encouraged. *Hibah* is not valid until possession is given of the subject-matter. The taking back of a gift from the donee is reprobated. A creditor may make a gift of the debt owing to him, to the debtor, and this will operate as a release. A man giving a property to another, it becomes the donee's absolutely, but if it is given on condition that the donee is to enjoy it for life then on his death the property will revert to the donor.

Sadaqah, or charity, in its widest sense is enjoined as a means of securing the highest spiritual benefit. It is expressed to include not only alms or gifts to the poor, but benefactions in any form either to an individual, rich or poor, relative or stranger, to the public or to a class of persons. A distinction is made between simple gift and *Sadaqah* in the fact that by the former the donor stipulates for no spiritual reward while he does by the latter. The Prophet instructs a Muslim to settle his property (by way of *Wakf*) so that the corpus or substance may not be alienated and the profits may be devoted to purposes of *Sadaqah*. Besides landed property, he appears to have held that a camel may be made *Wakf*, and also a coat of armor and other weapons of warfare, in the cause of religion.

A man selling his share in an undivided property must first of all offer it to his co-sharer (*Shuf'ah*). If the share is divided by metes and bounds no right of *Shuf'ah* arises.

A lease of land for a short period for a fixed rent in money is lawful, and it is reported that the Prophet himself and his companions granted leases. He disapproved without forbidding it, a lease by which a certain portion of the produce or the produce of a particular plot is stipulated to be given to the lessor as rent, because of the uncertainty of consideration.

The power of disposing of property by a will is restricted to

one-third of a man's possession. He cannot bequeath more than that even to a charity or for religious purposes. A bequest in favor of an heir is declared invalid unless the other heirs assent to it. A testamentary disposition may be made even by signs.

In the domain of the law of inheritance, there are several important principles established by the Hadith. The doctrine of residuaries (*Asabah*) is enunciated to the effect that after satisfying the shares the residue is to go to the nearest male heir. The right of the distant kindred to inheritance in absence of sharers and residuaries is also laid down explicitly. For instance, sisters' children and the maternal uncle are admitted to inheritance if there is no nearer heir. The right of inheritance vests in a child on birth if it lived long enough to utter a cry. An illegitimate child does not inherit from his natural father and his descent from him is not recognized by the law. But he may inherit from his mother. A Muslim cannot inherit from an infidel nor an infidel from a Muslim. An apostate from Islam forfeits his right to inheritance. A person that has caused the death of another is debarred from inheriting the estate of the deceased.

A scale of fines or compensation (*diyah*) is fixed according to the nature of the offense.

For minor offenses, not being of the nature of those for which the punishment is fixed by the *Qur'an*, the sentence is not to exceed 10 stripes, according to some traditions, and according to the others the maximum is 40 stripes. Abuse and defamation (not amounting to *Qadhf*) are instances of offences of this class.

A magistrate should decide a case in the presence of parties. The burden of proof is laid on the plaintiff. He is to adduce evidence, if any is available in support of his allegation, but if no such evidence is adduced or accepted, the defendants will be asked to take the oath if he denies the claim or charge. On his taking the oath he will be absolved from liability. A man of *Hadhramaut* and a man of *Kindah* came to the Prophet, the one complaining that the other had wrongfully taken his land. The man of *Kindah* denied the plaintiff's claim and asserted that the land was his and he had possession of it. The Prophet asked the plaintiff if he had any evidence in support of his claim, and on his replying in the negative observed that he was entitled to call upon the defendant to take the oath. The plaintiff said, "O Prophet of God, that man (meaning the defendant) does not mind swearing to anything and does not fear God." The Pro-

phet said to the plaintiff, "that is all that you are entitled to" (meaning the defendant's oath). The defendant then went away to take the oath, and as he left the Prophet's presence he observed, "If the man (meaning the defendant) falsely swears in order to keep what is not his, then when he will meet God on the day of Judgment he will find His face turned away from him in anger." A case is reported in which two persons laid claim to a beast of burden and both of them adduced evidence. The prophet decided in favor of the person who had possession of the animal. In another case in which each of the parties produced evidence the Prophet ordered lots to be cast. The testimony of a dishonest person, of an adulterer or adulteress, of a person who bears malice towards his neighbor or of a slave in favor of his master is not to be accepted.

With the Prophet's death, which occurred in June, 632 A. D., the eleventh year of the Hijrah, a new era commenced in the history of Mohammedan Jurisprudence. There was no longer an accredited messenger through whom God could promulgate His wishes and commands for the guidance of the Muslims. The Divine Book and the precepts and precedents of the Prophet were closed, though they were still accessible for reference and instruction. If a text of the Qur'án or pronouncement of the Prophet covered a point, there was no difficulty; or, if the Prophet had decided a similar case, the decision was no doubt a binding precedent to follow. But not merely fresh facts but entirely new circumstances arose, for which no provision had been made, especially as the affairs of the community became more complex with the growth of the Empire. In the absence of authority the Companions had to guide themselves by the light of their reason, having in regard those usages ('urf) of the community which had not been condemned by the Prophet. Those who were associated with the Prophet as his companions and often shared his counsels must have known, as if by instinct, the policy of Islamic law, and whether a particular rule or decision was in harmony with its principles. It is presumed therefore that an agreement among the Sahábah in a particular view, vouched for its soundness and such agreement (ijmá') has been treated as an independent source of law next only to the Qur'án and the Hadíth. The first and the most momentous problem that the community had to solve on the Prophet's death was that of finding a successor to him as the head of the Mohammedan commonwealth. Over this question the Mohammedan world has since then divided itself into two hostile

factions, the Shi'ahs, who assert that the Imamate or Caliphate should have continued in the family of the Prophet, and the rest of the Mohammedan bodies who support the right of the community (Jamá'ah) to elect the chief.

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